90-1228 1

(1)

FILED
FEB 1 1991

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

TAMMY S. FYKE

Petitioner

vs.

THE STATE OF ILLNOIS

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF ILLINOIS

Ronald A. Niemann
NIEMANN AND PARKER
830 E. Noleman
P.O. Drawer G
Centralia, IL 62801
(618)533-0466

Counsel for Defense

QUESTIONS PRESENTED FOR REVIEW

This Petition for a Write of Certiorari presents two questions:

I. Whether the petitioner's arrest was obtained in violation of her Fourth Amendment rights where she was arrested on a warrant issued without an oath. Also whether the State's conduct of falsifying the Information to make it look like the warrant was issued as a result of sworn information violated petitioner's Fifth Amendment right to due process?

II. Whether at the Sentence Hearing when the Court considered written statements of Co-defendants not otherwise available for confrontation and cross examination was petitioner's Sixth Amendment rights violated and whether the Illinois Extended Term Statute was applied to the defendant in violation of her Eighth Amendment rights.

LIST OF ALL PARTIES TO PROCEEDINGS IN THE ILLINOIS SUPREME COURT

The above caption to the case contains the names of all parties.

TABLE OF CONTENTS

Questions Presented for Review..... i
List of Parties.....ii
Table of Authorities.....iii
Reference to Reports and Opinions..... v
Statement of Jurisdictional Grounds.....vi
Constitutional Provisions Involved...vii-ix
Statement of the Case..... 1
Reasons for Granting Writ.....18
Conclusion.....43
Exhibit Listings.....45

TABLE OF AUTHORITIES

CASES — Page

People v. Tammy S. Fyke
(Appellate Court 5th Dist. 1990)..... v

People v. Harding
(1966), 34 Ill. 2d 374, 216 N.E.2d 147...19

Albrect v. U.S.
(1927), 273 U.S. 1.....19

Napue v. Illinois
(1959), 360 U.S. 264.....20

Wong Sun v. U.S.
(1963), 371 U.S. 471.....21, 22, 26

Silverthorne Lumber Co. v. U.S.
(1920), 251 U.S. 385.....21

Davis v. Mississippi
(1969), 394 U.S. 721.....21

People v. Wilson
(1965), 60 Ill. 2d 235.....22

Payton v. New York
(1980), 455 U.S. 573.....23

Brady v. Maryland
(1963), 373 U.S. 83.....23

U.S. v. Agurs
(1976), 427 U.S. 97.....23, 24

People v. Brownell
(1980), 79 Ill. 2d 508.....27, 33

Lee v. Illinois
(1986), 476 U.S. 530.....29

People v. Smallwood
(1984), 102 Ill. 2d 190.....34

Maynard v. Cartwright
(1988), 486 U.S. 356. . .....35, 36, 37
38, 40, 41

Godfry v. Georgia
(1980), 466 U.S. 420.....35

RULES AND STATUTES Page

Illinois Supreme Court Rule 412..... 4

Ill. Rev. Stat. (1985)
ch. 38, sec. 1005-5-3.2(b)(2)... 13, 32, 33
34, 36, 38, 41

Ill. Rev. Stat. (1985)
ch. 38, sec. 107-9(a)(4).....18

Ill. Rev. Stat. (1985)
ch. 38, sec. 107-9(b)(4).....19

Ill. Rev. Stat. (1985)
ch. 38, sec. 111-3(b).....19, 20

Ill. Rev. Stat. (1985)
ch. 38, sec. 9-1(b)(5).....33

Ill. Rev. Stat. (1985)
ch. 38, sec. 1005-8-1(a)(1)(a).....35

ILLINOIS CONSTITUTION Page

Ill. Const. (1970), art. I, sec. 8.....28

REFERENCE TO REPORTS OF OPINIONS

The published decisions of the Appellate Court of Illinois, Fifth Judicial District, was filed on March 21. 1990 [People v. Tammy S. Fyke,(Appellate Court 5th District, 1990)], and appears as Appendix A to this petition. The petitioner filed a petition for leave to appeal to the Supreme Court of Illinois, which was denied. The decision of the Supreme Court of Illinois on October 3, 1990, 133 Ill. 2d 564, 561 N.E.^{2d} 968, 149 Ill. Dec. 328, appears as Exhibit D to this petition.

UNITED STATES SUPREME COURT

Jurisdiction of This Honorable Court is invoked under the provision of 28 U.S.C. 1257(a). The Supreme Court of Illinois denied the petitioner's leave to Appeal the decision of the Appellate Court which affirmed the trial court's holdings.

Petitioner's counsel submits the Petition for Writ of Certiorari after the time for petitioning has lapsed. However, because of unusual circumstances involving counsel's health and his misconstruction of Rule 13.1, all more specifically stated in an Affidavit filed herein and referred to as Exhibit "D," the lateness of filing the Petition for Writ of Certiorari is thought to be excusable.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. IV.

***

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offence to be twice

put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public, without just compensation.

U.S. Const. amend. VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV, sec. 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any Sate deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The defendant, TAMMY S. FYKE, was convicted of murder on the theory of accountability and sentenced to sixty (60) years in prison. The State alleged that the defendant, TAMMY S. FYKE, was accountable for the shooting death of Robert Alderson, Jr., by Gary Daubman, on September 4, 1986.

PRE-TRIAL PROCEEDINGS

At the hearing on defendant's Motion to Quash Arrest Warrant and Suppress Evidence, held April 15, 1987, State's witness Larry Coughlin testified that he participated in an investigation into the death of Robert Alderson, Jr. (R 2077) Exhibit #3 was a complaint for a search warrant presented to Judge Hodson. On September 10, 1986, at 3:00 a.m., the complaint for the search warrant that Coughlin had signed under oath, with

attachments of statements of Gary Daubman, was presented to the Judge, at his residence. In addition to witness Coughlin, State's Attorney Matoush, not under oath, appeared in front of Judge Hodson at the same time and presented an Information which was referred to as Exhibit #1 (R 10) (R 2254) (R 2316). The State's Attorney requested Judge Hodson to issue an arrest warrant for defendant Tammy S. Fyke on the strength of the criminal Information not under oath. Judge Hodson does not recall whether or not the State's Attorney's signature on the Information had been notarized by notary Michelle K. Turner, but the Judge did not believe, when he saw it at 3:00 a.m., that there was a file stamp on the Information (R 2368). Later, the State's Attorney stated to the Court in argument at pre-trial proceedings, that the notarization of his signature on

the Information did not mean a thing (R 2460).

The notarization of the State's Attorney's signature on the Information, nor the file stamp, were present when Judge Hodson was shown the Information at 3:00 a.m., Monday, September 10, 1986 (R 2340) (R 2385-6). Judge Hodson issued a warrant for Tammy S. Fyke's arrest shortly after the State's Attorney himself, not under oath, had presented the unsworn criminal Information (R 10) to the Judge (R 12).

Judge Richard Hodson stated that he relied on the written documents presented to him to make his Probable Cause determination to issue an arrest warrant. He could not recall relying on any oral supplementation (R 2366). The State's Attorney was not placed under oath (R 2367), but he presented an Information showing the Judge that a charge of murder was lodged against Tammy S. Fyke (R 2373).

In argument on the Motion to Quash Arrest and Suppress Evidence (R 2461), the State's Attorney stated, (referring to defense counsel's argument) "you know, is it somehow not a charge because it didn't have a notary stamp on it." When you have got the State's Attorney right there telling the Judge, "I filed that charge. That's my charge." I submit that it doesn't; that is a ridiculous argument (R 2461).

On April 15, 1987, at the hearing to quash the warrants and suppress evidence, the State's Attorney continued to insist that he had filed a sworn Information charging the defendant with murder. The State's Attorney does not claim that the alleged charge was supported by any other document (R 2247) (R 10).

The defendant, under Ill. Sup. Ct. Discovery Rule 412, filed a Pre-Trial Discovery Motion on September 26, 1986, requested, among other items, Paragraph 12,

which asked for "any material or Information known to the State which tends to negate the guilt of the defendant as to the offense charged in the above-entitled case, or would tend to reduce her punishment, should she be convicted" (R 0115).

The Trial Judge, hearing defendant's motion to suppress, found that the inclusion of Tammy S. Fyke's name in the complaint for search warrant presented to Judge Hodson by agent Coughlin was false (R 2489). The name "FYKE" thereafter was stricken from the Complaint for Search Warrant (R 2489). The Trial Judge then looked at the Complaint for Search Warrant to see if there would still be probable cause on which Judge Hodson could issue the arrest warrant. The Trial Judge stated that the issue was not whether Judge Hodson had relied on the false statements in making his determination of Probable Cause,

but whether Probable Cause existed after the false statements had been removed from the Complaint (R 2490). The Trial Judge remarked that Agent Coughlin admitted making false statements to the issuing Judge (R 2490). The Judge then remarked "I think these statements were made falsely" (R 2490). The Trial Judge then stated that if the officer had intended to deceived Judge Hodson with false information, the integrity of the entire warrant would be destroyed and the arrest warrant would have been invalidated and void (R 2490). The Trial Judge found certain statements, by the State, were made falsely; that the falsehoods were more than a mistake when they were placed in the Complaint for Search Warrant. The Trial Judge further stated that he did not think it was negligence. He stated that he found the false statements were made with reckless disregard for the truth (R 2491). The

Trial Judge stated that an arrest warrant cannot issue without probable cause supported by affidavit (R 2492). The Trial Judge stated that the totality of circumstances can be looked at, what was presented to Judge Hodson at the time he issued the warrant (R 2492). Judge Hodson was presented with an Information without a notarized oath of the State's Attorney's signature (R 10) and a Complaint for Search Warrant presented by Agent Coughlin, who was under oath at the time he appeared in front of Judge Hodson, and at the time Coughlin signed the Search Warrant Affidavit (R 2492). The Trial Judge, in ruling on the motion to suppress, found that the totality of circumstances, based on the totality of the Complaint for Search Warrant presented to Judge Hodson, the affidavit presented to the Judge, the statement of Gary Daubman, and the statement of Agent Coughlin of when he came

up with the name "FYKE," was sufficient evidence when combined with the background information which was provided to Judge Hodson under oath to find Probable Cause for the issuance of an arrest warrant for the defendant (R 2494). The motion of defendant Tammy S. Fyke to quash the arrest was denied (R2492) (0885) (R 0889) (R 0994) (R 1000).

Thereafter, motions in limine were heard and ruled upon, the defendant then waived her right to trial by jury (R 1009) and agreed to permit the trial court to determine her guilt or innocence (R 2546-47) on a stipulation of evidence.

The Trial Court, after reviewing the evidence as stipulated stated and found that the defendant was guilty of murder beyond a reasonable doubt (R 2567).

SENTENCE HEARING

At the Sentence Hearing the State presented Agent Coughlin in aggravation,

who identified Exhibit #1 as a statement given by co-defendant Gary Lynn Daubman; Exhibit #2 as a statement given by co-defendant Doug Fyke; Exhibit #3 as a statement given by co-defendant Gale Rankin; Exhibit #4 as a statement given by co-defendant Tim Clifton (R 2576-80).

The defendant objected to Exhibits #1, #2, #3 and #4 being admitted at the Sentence Hearing as the defendant would have no way to confront and cross-examine because all were co-defendants and could take the Fifth Amendment (R 2581). The Trial Judge admitted the exhibits into the evidence at the Sentence Hearing over objection (R 2582).

It was stipulated that the defendant's date of birth was December, 1963.

The State requested the Court to take judicial notice of the Court's own files. Case Nos. 86-CF-112 and 86-CF-125, People

vs. Gary Daubman, Frank Volkmar, Gale Rankin (R 2592).

The transcript of People vs. Frank Volkmar was used as a large part of the stipulated evidence in this case (R 2592).

The State requested the Court to take into consideration the testimony of Frank Volkmar in the trial of the stipulated transcripts (R 2592). The defendant objected to the Court's taking Frank Volkmar's trial testimony in aggravation for the reason that the defendant has no way to cross-examine the transcript (R 2593). The Court took judicial notice of its own files with regard to the sentences each defendant received (R 2593).

The Court refused to admit co-defendant Frank Volkmar's testimony because the Court did not believe Frank Volkmar was being truthful in his testimony (R 2594).

In mitigation, the defendant called Eileen Koelling, the defendant's mother.

Mrs. Koelling stated that the defendant was provided with a religious background and that the defendant was a loving and caring child (R 2596-97). Tammy S. Fyke has two children and is a very good and caring mother. The witness did not notice her daughter to be using drugs (R 2599). Her daughter came to her and said she was over her head in drugs (R 2599) and that Tammy S. Fyke wanted to get out of the situation she found herself in. Had she known her situation, her husband and she would have sought drug rehabilitation for her (R 2600). She stated that her daughter had been a successful insurance agent with Pioneer Insurance Company (R 2602).

Mr. Koelling, the defendant's father, testified that Tammy grew up in a normal home and went to church every Sunday (R 2608). Tammy was loving and caring towards others, and was never known to be violent. Tammy came to his house one time in August,

1986 looking for money to buy a car. She said she wanted to leave town. He didn't known anything about a drug problem (R 2610).

Kathleen Wade has known the defendant all of her life. She was a well adjusted child and was loved by her adoptive parents (R 2616). Tammy has written her since she is in jail. I believe she has accepted Christ as her savior and has faith and seems to be well adjusted and a very good person (R 2617).

Mary Milano is a teacher in Salem, Illinois. She grew up in the same church as Tammy. Tammy was always around to help (R 2621).

The State's Attorney argued at Sentence Recommendation that the killing of Robert Alderson, Jr. was done pursuant to a contract for money (R 2622-A). Further, that the killing occurred because the defendant believed the victim was going to

be a government informant (R 2622-A). The defendant is over eighteen (18) years of age. The State argues that the murder was accompanied by exceptionally brutal and heinous behavior, indicative of wanton cruelty (R 2623) (emphasis added). The State asserts that a finding that the murder was accompanied by exceptionally brutal and heinous behavior indicative of wanton cruelty, can be the basis of an extended term sentence which would enhance the punishment handed out by the court under Ill. Rev. Stat., ch. 38, sec. 1005-5-3.2(b)(2), (R 2623).

One of the factors the State argues that would require an extended term sentence was the burning of the body several days after the killing (R 2626) (emphasis added).

The State points out that Tim Clifton stated he was drafted by the defendant to do the burning of the body. The Sate

argues that the defendant paid Clifton $500.00 for his help in burning the body after the killing and that this is indicative of the exceptionally brutal and heinous circumstances of the crime (R 2626) (R 2633) (emphasis added).

Again, the State argues to the Court that the act of paying for and arranging the burning of the body two days after the killing is significant evidence that Tammy S. Fyke is cold-blooded and ruthless (R 2640) (emphasis added).

Defendant's counsel argued that Gary Daubman, who got a term of imprisonment for life, and previous offenses. A sex offense whereby Daubman had only been out of the penitentiary a couple of months before killing Alderson. Daubman had a juvenile record. He was arrested on a pending rape charge.

Frank Volkmar got sixty (60) years. He had prior felony convictions (R 2642).

Counsel for the defendant Tammy S. Fyke asserts that the record shows the defendant led a law abiding productive life for the first twenty (20) years of her life (R 2648).

The Trial Court considered the evidence it received on the trial by way of stipulation, the presentence report, the evidence and information offered by the parties in aggravation and mitigation (R 2653). The court took into consideration arguments as to sentence alternative (R 3654).

The Judge found that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty (emphasis added). The Judge then stated that his finding took the Court beyond the usual term as fixed by the legislature (R 2655). The Judge stated that murder usually carries a sentence of

not less than twenty (20), nor more than forty (40) years (R 2655).

The Trial Judge stated, however, that Judges in other cases have made the same finding that he made with regard to the exceptionally brutal or heinous behavior indicative of wanton cruelty (emphasis added).

Further, the range of sentence in those other cases was the enhanced penalty of extended term. The Court felt this case should be one that also falls within the same range (R 2656).

The Trial Judge then found that Tammy S. Fyke had no prior convictions for any criminal offense (R 2657). That Tammy acknowledged guilt and a showing of remorse. The Court stated that there was no reason to treat Tammy any different than the Court treated Frank Volkmar. The Court found that the two cases were not exactly alike; that Tammy and Frank's situations

were not similar, however could see no reason to vary the sentence (R 2657).

Then, the Judge entered an enhanced penatly of extended term of imprisonment sentence to the Illinois Department of Corrections, Adult Division, for a period of sixty (60) years.

Judgment was thereafter entered on the findings and the sentence.

REASONS FOR GRANTING THE WRIT

I

THE PETITIONER WAS ARRESTED BY ISSUANCE OF A WARRANT NOT OBTAINED BY SWORN INFORMATION IN VIOLATION OF HER FOURTH AMENDMENT RIGHTS AND THE STATES ATTORNEY ALTERED THE CHARGING INSTRUMENT THEREAFTER TO MAKE IT LOOK LIKE THE WARRANT WAS ISSUED UNDER OATH. THE STATE'S CONDUCT WAS IN VIOLATION OF PETITIONER'S FIFTH AMENDMENT RIGHTS.

The Trial Court erred in denying defendant's Motion to Quash Arrest and Suppress Evidence (R 2494). The State's Attorney presented an unsworn Information (R 0010) to Judge Hodson on September 10, 1986, at 3:00 a.m. to obtain an arrest warrant for the defendant (R 0012) (R 2340).

Ill. Rev. Stat. (1985) ch. 38, par. 107-9(a)(4) states as follows:

"(a) When a complaint is presented to a court charging that an offense has been committed, it shall examine upon oath, or affirmation, the complaint or any witnesses."

Ill. Rev. Stat. (1985) ch. 38, par. 107-9(b)(4) states as follows:

"(b) The complaint should be in writing and shall:

(c) Be subscribed and sworn to be the complainant."

The Information was presented by State's Attorney Matoush (R 2340) and was unsworn at the time of presentation (R 2367) (see Defendant's Exhibit No. 1 for identification at Motion to Suppress). A sworn Information or complaint is a prerequisite to the issuance of an arrest warrant. U.S. Const., amend IV. People vs. Harding (1966), 34 Ill.2d 374, 216 N.E.2d 147, 150 citing: Albrecht vs. U.S. (1927), 273 U.S. 1, 5.

Ill. Rev. Stat. (1985) ch. 38, par. 111-3(b) states the law as follows:

"(b) An indictment shall be signed for the foreman of a Grand Jury and an Information shall be signed by the State's Attorney and sworn to by him or another" (emphasis added).

The State's Attorney's conduct was a violation of "due process" as set forth in the Federal Constitution Amendment V. The State's Attorney in this case failed to follow the Federal or Illinois Constitutions or the above quoted Illinois State statutes. The Trial Judge has confused probable cause for issuance of a search warrant with what is required by law to issue an arrest warrant to seize the body of a person (R 2492-94). In fact, the State's Attorney altered the face of the Information to make it look like it had been presented under oath after it had been presented to Judge Hodson at 3:00 a.m. on September 10, 1986 (R 2385-86). This amounted to creating evidence in the State's favor contrary to law (R 2340). Napue v. Illinois, 360 U.S. 264, 269-72.

The remedy for the State's violations of the Federal and Illinois Constitution and state statutes is to grant a new trial. There was not otherwise probable cause, at that time, to arrest the defendant. If the defendant's Motion to Quash and Suppress the Evidence is granted on remand because of the State's Attorney's failure to follow the State Statutes, the Trial Court likely would thereafter suppress all the evidence and confessions that would be the "fruit of the illegal arrest." Wong Sun vs. U.S. (1963), 371 U.S. 471, 487-88; Silverthorne Lumber Company vs. U.S. (1920), 251 U.S. 385 "The exclusionary prohibition extends as well to the indirect as the direct products of such invasions."

In Davis vs. Mississippi (1969), 394 U.S. 721, the defendant's identity and connection to the illegal activity was first discovered through an illegal arrest. Had it not been for the illegal detention,

the defendant's fingerprints would not have been obtained and he would never have been a suspect. In this case, but for the illegal arrest, Tammy S. Fyke may not have given a statement inculpating herself. Therefore, the statement and confessions of Tammy S. Fyke are subject to suppression as the fruit of an illegal arrest.

"Whether granting establishment of the primary illegality, the evidence to which instant objection is being made, has been come at by the exploitation of the illegality, or otherwise by means sufficiently distinguishable to be purged of the primary taint." Wong Sun vs. U.S. (1963), 371 U.S. 471, 488. People vs. Wilson (1965), 60 Ill.^{2d} 235, 237.

The basis of the need for a new trial is because the violations, as above mentioned, require quashing the arrest warrant and evidence obtained thereafter by the State. The remedy for the violations,

as above stated, trigger the "exclusionary rule." Therefore, Tammy S. Fyke's statement would not be available to the State for evidence against her.

Whether the defendant's arrest would be proper as a warrantless seizure cannot be determined on this record. In the case of Payton vs. New York, 455 U.S. 573, 100 S.Ct. 1371, 63 L. Ed. 639 (1980), the Court held that police officers may not make a warrantless entry into a suspect's home to make a routine arrest. In the absence of exigent circumstances, the police must obtain an arrest warrant.

In addition to the above, the State has willfully violated Illinois Supreme Court Rule 412. The State has wilfully hidden matters favorable to the defendant that were known to the State in violation of Brady vs. Maryland and U.S. vs. Agurs.

In Brady vs. Maryland (1963), 373 U.S. 83, 87, the Supreme Court held "that the

suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilty or to punishment, irrespective of the good faith or bad faith of the prosecution." Without a doubt, this record shows the prosecution from September 26, 1986 to April 16, 1987, withheld important facts from the defendant. First, that he had "doctored" up the original information that had been presented to the Court for an arrest warrant to make it look like he was following state law. Second, that he presented a complaint for a search warrant that was recklessly "doctored" to include falsely the defendant's name in it.

In U.S. vs. Agurs (1976), 427 U.S. 97, the Court extended the prosecutor's duty to disclose favorable material evidence to a defendant even if the defendant had failed to file a request. In the case at bar, the State's Attorney was acting in bad faith

from the beginning of the formal approach to the case in Judge Hodson's presence (R 2460).

A meaningful opportunity to present a defense under the due process clause surely includes access to evidence that is guaranteed by both the U.S. and State Constitutions. The Spirit of Illinois Supreme Court Rule 412 requires good faith conduct on the part of the State. The withholding of critical facts about the arrest warrant and Complaint for Search Warrant from September 26, 1986 to April 16, 1987 clearly shows the State was not merely negligent, but that it had in fact attempted to conceal from the defendant, for use at pre-trial motions and for impeachment purposes at trial, the fact that the arrest warrant had been illegally issued and that the Complaint for a Search Warrant was "doctored" with false information about the defendant.

Judging the State's Attorney's conduct of concealment and falsification by Brady and Agurs cited above, would require the quashing of the arrest warrant and suppressing evidence and defendant's confession as a "fruit of the poisonous tree." Wong Sun vs. U.S. (1963), 371 U.S. 471.

II

AT THE SENTENCE HEARING PETITIONER'S SIXTH AMENDMENT RIGHT TO FACE HER ACCUSERS WAS VIOLATED AND PETITIONER'S SENTENCE WAS ARBITRARY AND CAPRICIOUS IN VIOLATION OF THE EIGHT AMENDMENT.

The Trial Court took judicial notice of the written statements and sentencing of other co-defendants (R 2582). This was error. The State argued that the death of the victim was a "contract killing" when the record does not support that statement (R 2622-A). People vs. Brownell, 79 Ill. 2d 508.

> "In Brownell, the sentencing judge construed the defendant's conduct as giving rise to an aggravating circumstance that was not actually warranted by the evidence. Thus, the Trial Judge's finding of the existence of the "murdered eyewitness" circumstance introduced into the case, and therefore into his sentencing determination factual matters that should not have been considered."

The State also patched in the written statements from co-defendant Gary Daubman,

a statement from co-defendant Doug Fyke, a statement of co-defendant Gale Rankin, and statement by co-defendant Tim Clifton (R 2576-80). The defendant was not able to confront and cross-examine these declarants at the Sentence Hearing which is contrary to the defendant's rights under the U.S. Constitution, Amendment VI (R 2581). Ill. Const. (1970), art. I, sec. 8, Rights After Indictment:

> "In criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation and have a copy thereof; to meet the witnesses face to face and to have process to compel the attendance of witnesses in his behalf; and to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed."

If the defendant were to attempt to cross-examine the co-defendants as live witnesses, she would be faced with a Fifth Amendment claim of self-incrimination.

The fundamental fairness of the defendant's Sentence Hearing was compromised by permitting into evidence various co-defendants' statements. The prejudice to the defendant in allowing that type of sentencing testimony from co-defendants far outweighed whatever relevance it might have in the sentencing process. In addition, confessions of accomplices which incriminate the defendant are presumptively unreliable and should not be admitted into evidence unless sufficient indicia of reliability exists to overcome the presumption. Lee v. Illinois (1986) 476 U.S. 530, 541, 90 L. Ed.2d 514, 526, 106 S. Ct. 2056, 2063. The admission of co-defendants' confessions implicating her in the crime denied her of her right to confront witnesses against her. U.S. Const. amend. VI. In fact, the Sentencing Judge commented on one co-defendant as untruthful (R 2594). It is unlikely that

there was any indicia of reliability of any of the co-defendants.

The Trial Court, erred in not adequately balancing the seriousness of the offense with the rehabilitation potential of the defendant. The defendant was twenty-three (23) years old (R 1040) with no prior ciminal history (R 2657) (R 1044).

The majority of the Trial Court's considerations at the Sentence Hearing was on aggravating factors, and not on defendant's potential for rehabilitation. Only once did the Trial Judge consider rehabilitation and that came after the Court entered a sixty (60) year extended term sentence.

> "Certainly if this defendant ever is to return to productive life, that time is necessary to satisfy the public that this will deter others from committing the same offense and to warn others to obey..." (R 2658).

The Trial Judge did recognize that the defendant was a proper person to consider

for rehabilitation (R 2657) but instead of balancing that consideration the Judge relied on improper factors to impose an extended term sentence (R 2657).

The reason given by the Court for the extended term was that the Judges in the "other cases have made the same finding with regard to the exceptionally brutal or heinous behavior indicative of wanton cruelty, and the range that was considered in those cases was the range of extended term" (R 2656).

The Court found the Mrs. Fyke was at the scene of the killing and her behavior was cold-blooded and ruthless (R 2656).

The defendant's sentence of sixty (60) years in the Department of Corrections was excessive and was error. As stated above, the Trial Judge did not balance the evidence to give the proper weight to the defendant's potential for rehabilitation. The Court focused only on the seriousness

of the offense and on punishment to the defendant.

In order to persuade the Court to go beyond the maximum penalty in range of years, the State's Attorney argued at sentencing that the crime was exceptionally brutal and heinous indicative of wanton cruelty within the meaning of ch. 38, sec. 1005-5-3.2(b)(2), (R 2623), (emphasis added).

The State asserted that the defendant's conduct spoke louder than her words of remorse. The Act of paying for and arranging the burning of the body two days after the killing shows no remorse, no respect for the victim. The State argues that Tammy S. Fyke is cold blooded and ruthless (R 2640). The State asks the Judge not to let Tammy's appearance fool the court that the defendant is evil and that she should be severely punished (R 2641).

The Trial Court did not acknowledge what the requirements were that needed to be met for imposing an extended term on the defendant (R 2655). To impose an extended term under sec. 1005-5-3.2(b)(2), the Court must find that defendant's conduct in the offense made the crime an offense which was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty (emphasis added).

The Court did find, in aggravation, that the defendant procured another to commit the murder for money (R 2655). The defendant asserts that the evidence does not support this finding. People vs. Brownell, 79 Ill. 2d 508. In any event, the murder for money is a factor under ch. 38, sec. 9-1(b)(5), not ch. 38, sec. 1005-5-3.2(b)(2).

In addition, there was no finding of torture of the victim, nor serious physical abuse to the victim other than the abuse

accompanying the murder itself. Therefore, the Trial Court erred in finding the defendant a candidate for an extended term sentence on this record. The Trial Judge focused solely on the victim's death in determining the extended term sentence since there was no extreme degree of harm otherwise shown. The State also repeatedly referred to the burning of the victim's body (R 2626) (R 2640) to focus the Court on an extended term sentence. This was error. The Court may not take into consideration the act of the burning of the body, after the killing, for purposes of sentencing the defendant to an extended term. People vs. Smallwood (1984), 102 Ill. 2d 190, 195, 196.

Ill. Rev. Stat., ch. 38, sec. 1005-5-3.2(b)(2) is unconstitutional as applied on the facts to this defendant, and fails to support a sentence more severe than that allowed by the normal legislative range of

sentencing for the crime of murder. Ill. Rev. Stat., ch. 38, sec. 1005-8-1(a)(1)(a).

A statutory aggravating circumstance finding that a murder was especially heinous, atrocious or cruel, does not, by itself, provide adequate guidance for the exercise of sentencing discretion and, therefore, is unconstitutionally vague and overbroad under the Eighth Amendment of the U.S. Constitution (emphasis added).

Maynard vs. Cartwright, 486 U.S. 356, 100 L. Ed^{2d} 372, 108 S. Ct. 1853 (1988). The Maynard case cites Godfrey vs. Georgia (1980), 466 U.S. 420, where in the U.S. Supreme Court observed:

> "A person of ordinary sensibility could fairly characterize almost every murder as outrageously or wantonly vile, hostile and inhuman," at 428-29.

In the Maynard case, the Oklahoma statute stated as an aggravating circumstance, that the murder (to enhance the sentence) was especially heinous,

atrocious, or cruel (emphasis added). The history of the cases decided by the Oklahoma Courts had considered the attitude of the killer, the manner of the killing, and the suffering of the victim, to be relevant and sufficient to support the aggravating circumstance. The Oklahoma Court simply would allow a review of all the circumstances of the murder and then decide whether the facts made out the aggravating circumstance. This is similar to the Illinois Statutory Scheme, Ill. Rev. Stat., ch. 38, sec. 1005-5-3.2(b)(2).

The State of Oklahoma argued that there were some cases where the factual circumstances so plainly characterize the killing as "especially heinous, atrocious, or cruel," that affirmance of the death penalty is proper (emphasis added).

In Cartwright, the defendant had a motive of getting even with the victims, he lay in wait for the victims. The defendant

killed the husband and brutally attacked the wife. He hid the evidence and stole from the victims. Oklahoma Courts held this was enough to support a finding that the murder was especially heinous, atrocious, or cruel. The United States Supreme Court rejected this finding.

The Maynard Court rejected this argument on the grounds that the Eighth Amendment forbids aggravating circumstances that fail to adequately inform tiers of fact what must be found to impose the death penalty. The Oklahoma result leaves a kind of "open ended" discretion that was held invalid in other cases.

The State of Oklahoma complained that to be valid, the "especially heinous, atrocious, or cruel" aggravating circumstance must be construed to require torture or serious physical abuse (emphasis added). The Supreme Court of the United States noted that the United States Court

of Appeals had cited cases where this kind of proof would be enough to validate an otherwise vague aggravating circumstance. However, the United States Supreme Court, likewise, would not hold that torture or serious physical abuse were the only limiting construction of the "heinous, atrocious or cruel" aggravating circumstance constitutionally acceptable (emphasis added). Maynard vs. Cartwright, 486 U.S. 356, 100 L. Ed^{2d} 372, 108 S. Ct. 1853 (1988).

Ill. Rev. Stat. sec. 1005-5-3.2(b)(2) does not place a clear and substantial limitation on the discretion of the sentencing Judge. Therefore, although the statute may be constitutional on its face, but it cannot be applied in a manner such as the Sentencing Judge did in this case, whereby it would lead to an arbitrary result.

The Trial Judge has a role at the Sentence Hearing to weigh the aggravating and mitigating factor. The aggravating factors of a murder for hire, or as the State's Attorney argued, a contract for money (R 2622-A) is not supported by this record. Nor does the record support a theory that the victim was killed because he was a government informant, again contrary to the State's argument (R 2623). The Trial Judge did not find that the record supported the second theory. The Judge stated:

> "Whether or not to what extent the defendant felt that the victim was to be an informant, I am not quite sure" (R 2655).

Therefore, if an extended term sentence can be justified, it is solely on the basis of the Judge's statement:

> "And that this Court does find that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty. What that finding does is take this

Court beyond the term as fixed by the legislature" (R 2655).

Irrespective of the factors required to be weighed in this case, the Judge then went on to state he was making his finding based on what other Judges did in other co-defendants' cases (R 2656). This is the very evil that the United State Supreme Court in Maynard prohibits. This defendant's conduct, to qualify for an enhanced sentence, is described by the Judge in arbitrary terms.

Nowhere does the sentencing court described the conduct which qualifies Tammy S. Fyke for the enhanced penalty. There are no qualifying requirements stated to be weighed in aggravation with other mitigating factors. The Sentencing Judge seems to be saying that the other Judges found their cases to qualify for extended term sentencing, therefore, so must this Trial Judge. This is a manifest showing

that the Trial Judge figured erroneous matters in the sentencing decision.

In the case at bar, there is no evidence of torture or serious physical harm to the victim. The enhanced penalty is entered against the defendant in an arbitrary and capricious manner and therefore, is error. The failure to properly overcome the vagueness objection requires a finding that the application of the extended term statute, to this defendant, is unconstitutional. The application in this case of Ill. Rev. Stat., ch. 38, sec. 1005-5-3.2(b)(2) to the defendant is left unchanneled. The statute is vague and overbroad and fails to guide or limit the descretion of the Sentencing Judge in this case. Therefore, on the facts of this case, the enhanced penalty is error. Maynard vs. Cartwright, 486 U.S. 356, 100 L. Ed.^{2d} 372, 108 S. Ct. 1853 (1988).

The Trial Court entered a sentence of sixty (60) years imprisonment on a twenty-three (23) year old woman with no prior criminal record (R 1044). This sentence does not give Tammy S. Fyke any hope of rehabilitation. There is no suggestion, in this record, that the defendant is likely to commit other crimes. She led a law abiding life for twenty years. A sentence of this magnitude is not needed to protect the public from further criminal conduct by Tammy S. Fyke. The Trial Court abused its discretion. A minimum sentence of twenty (20) years would be adequate to deter others like the defendant from committing like crimes.

WHEREFORE, the defendant, Tammy S. Fyke, prays this Honorable Court to vacate her sentence and remand the case to the State of Illinois for re-sentencing of the defendant consistent with the standards set forth above.

CONCLUSION

The Petition for a Writ of Certiorari should be granted because of the following grave constitutional errors.

(a) The defendant was arrested on a warrant not issued under oath as required by the IV Amendment.

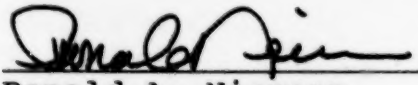
(b) The State falsified records to cover the fact that a warrant was issued not under oath. This violates the defendant's Fifth Amendment rights.

(c) The Sentencing Judge allowed co-defendants' confessions in the hearing, over objection, which violated the defendant's Sixth Amendment rights of Confrontation.

(d) The Sentencing Judge enhanced the punishment by an arbitrary and unconstitutional application of a state sentencing statute in violation of the defendant's Eighth Amendment rights.

For the above reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



Ronald A. Niemann
NIEMANN AND PARKER
830 East Noleman
P.O. Drawer G
Centralia, IL 62801
(618)533-0466

EXHIBITS

Exhibit A Order.....pp 1-11

Exhibit B Illinois Supreme Court
Letter of denial.....p 1

Exhibit C Illinois Appellate Court
Letter of Marion County
Circuit Clerk regarding
Mandate.....pp 1-2

Exhibit D Affidavit from Defense
Counsel.....pp 1-10

EXHIBIT A

Filed March 21, 1990
by Louis E. Costa,
Clerk, Appellate Court, 5th Dist.

NO. 5-87-0467

IN THE APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS	]	Appeal from the Circuit Court of Marion County
Plaintiff-Appellee,	]	No. 86-CF-123
v.	]	
TAMMY S. FYKE	]	Honorable Dennis Huber,
Defendant-Appellant.	]	Judge Presiding.

O R D E R

Defendant, Tammy S. Fyke, was convicted of murder by the circuit court of Marion County, sitting without a jury, and was sentenced to 60 years' imprisonment. On this appeal, defendant contends that the circuit court's judgment should be reversed or, in the alternative, that the judgment should be reversed and the cause remanded for either a new trial or a reduction of

her sentence. As grounds for this relief, defendant contends: (1) that the circuit court erred in denying her "Motion to Quash Arrest Warrant and Suppress Evidence," (2) that the circuit court erred in denying one of her motions in limine and permitting the State to introduce into evidence testimony regarding weapons which were found during the search of her home, and (3) that the circuit court erred in determining her sentence. For the reasons which follow, we affirm.

Defendant and her husband, C. Doug Fyke, were engaged in the sale of drugs in Salem, Illinois. Defendant was convicted of murder in this case based on her role in arranging for the murder of Robert Alderson, Jr., who she believed was a government informant and a threat to her and her drug dealing operations. Six other individuals were involved in the murder plot with her: her husband, Frank Volkmar,

Paul Potts, Tim Clifton, Gale Rankin, and Gar Daubman. Daubman was the person who actually performed the killing. Defendant, however, was the person whose idea it was to take Alderson's life, and she was a key participant in every step of the plan.

Defendant agreed to pay Daubman to do the shooting. She helped Daubman learn how to operate the murder weapon. SHe assisted in luring Alderson to the murder scene. Indeed, according to one of the other participants in the scheme, "Tammy was pretty much the one that was running the show in that respect." Defendant actually drove Alderson to the murder scene herself. Once there, Daubman ordered Alderson to lie face down on the ground and then shot him in the head three times at point-blank range. Defendant remained at the scene while Alderson was shot, and the following day she returned to destroy Alderson's body

by dousing it with gasoline and setting it on fire.

Defendant waived her right to a trial by jury, and a stipulated bench trial was conducted instead. The bulk of the evidence presented to the circuit court consisted of transcripts from the trial of Frank Volkmar, one of the other participants in the murder scheme. The facts as set forth in those transcripts are substantially the same as the facts which came to light during the prosecutions of Gary Daubman and defendant's husband, Doug. Opinions have recently been issued by this court disposing of Doug's appeal (People v. Fyke [1989], 190 Ill. App.3d 713, 546 N.E.2d 1101) and the appeal of Daubman (People v. Daubman [1989], 190 Ill App.3d 684, 546 N.E.2d 1079), and those opinions discuss in detail the circumstances of Alderson's murder and defendant's role in that murder. We shall therefore refrain

from setting out once again all of the particulars of defendant's crime.

On this appeal, defendant first argues that she was denied due process because at the time the warrant was issued for her arrest, the information presented by the State's attorney had not been sworn to as required by section 111-3(b) of the COde of Criminal PRocedure of 1963 (Ill. Rev. Stat. 1985, ch. 38, par. 111-3[b]). This precise argument was raised by defendant's husband in his appeal, and the procedure of which he complained was precisely the same as the procedure challenged here. Having rejected the argument when it was advanced by defendant's husband (see People v. Fyke [1989], 190 Ill. App.3d 713, 717-18, 546 N.E.2d 1101, 1104-05), we must likewise reject it here.

Defendant next contends that the circuit court erred in denying a motion in limine to exclude all reference to weapons

other than the weapon which was used to murder Alderson. Defendant's motion in limine indicated that she sought to exclude evidence regarding weapons other than the murder weapon because she believed that the relevance of such evidence was far outweighed by the prejudicial effect it would have on the jury. A threshold problem with defendant's argument on appeal, however, is that her motion in limine was not, in fact, denied outright. To the contrary, the circuit court ruled at the hearing on defendant's motions in limine that

> "at this point in time I would grant the Defense motion unless Mr. Potts [,the State's witness,] can specifically identify an individual weapon and at the same time if the Defense attempts to impeach the testimony of Mr. Potts with regard to the occurrences that he viewed, I

would allow on rebuttal the introduction of the testimony of the recovery of the weapons."

Moreover, after the circuit court ruled on defendant's motion in limine, the case was not presented to a jury. Rather, defendant agreed to a stipulated bench trial. The evidence to which defendant stipulated included testimony by Paul Potts given at Frank Volkmar's trial detailing all of the weapons he saw at defendant's house, and no further objection was interposed by defendant's attorney. Under these circumstances, we cannot see how the circuit court's ruling on defendant's motion in limine could be grounds for setting aside the judgment. In any case, given the evidence against defendant, we believe that any possible prejudice to her resulting from the admission of testimony regarding the weapons was relatively slight and was certainly not so great as to

conclude that defendant was denied a fair trial. Accordingly, even if testimony about those weapons should not have been admitted into evidence, the error was harmless. See People v. Fyke (1989), 190 Ill. App.3d 713, 719, 546 N.E.2d 1101, 1105.

Finally, defendant argues that the circuit court erred in determining her sentence. Various arguments are raised in this regard, but none has merit. Defendant contends for example that the circuit court improperly allowed the use of a victim impact statement at the sentencing hearing. As we have recently noted, however, consideration of victim impact statements is permitted by statute and is constitutionally impermissible only in capital cases. 190 Ill. App.3d at 721, 546 N.E.2d at 1106-07.

Defendant argues that the fundamental fairness of her sentencing hearing was

compromised by permitting into evidence statements by various other individuals who had participated in the plot to murder Alderson. Defendant's basic objection to the use of these statements was that they constituted hearsay and she was not able to confront and cross-examine the persons who had made the statements. Strict rules of evidence do not, however, apply in sentencing hearings, and hearsay evidence is admissible if it is relevant and reliable. As we did in People v. Fyke, 190 Ill. App.3d at 721, 546 N.E.2d at 1107, we believe that the statements here were relevant and reliable and conclude that their admission did not constitute error.

Defendant contends that the circuit court failed to adequately balance the seriousness of the offense with her rehabilitative potential. Defendant cites nothing in the record and has advanced no case law which would support such a claim,

and we do not believe that it merits further discussion.

Also without merit is defendant's contention that the circuit court should not have imposed an extended-term sentence upon her. An extended-term sentence may be imposed when the defendant has been convicted of a felony and the court finds that the crime was accompanied by exceptionally brutal or heinous behavior. (Ill. Rev. Stat. 1985, ch. 38, pars. 1005-8-2(a), 1005-5-3.2(b)(2).) There was ample basis for such a finding here, and we do not believe that the imposition of an extended-term sentence constituted an abuse of discretion. (People v. Fyke, 190 Ill. App.3d at 722, 546 N.E.2d at 1107.) Contrary to defendant's argument, we do no believe that section 5-5-3.2(b)(2) of the Unified Code of Corrections (Ill. Rev. Stat. 1985, ch. 38, par. 1005-5-3.2(b)(2)) is unconstitutionally vague as applied to

her. 190 Ill. App.3d at 722, 546 N.E.2d at 1108.

For the foregoing reasons, the judgment of the circuit court of Marion County is affirmed.

AFFIRMED.

HARRISON, J., with WELCH and GOLDENHERSH, JJ., concurring.

EXHIBIT B

70512 ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217)782-2035

October 3, 1990

Mr. Robert H. Rice
Attorney at Law
110 East Lincoln
Belleville, IL 62220

No. 70152 - People State of Illinois, respondent, v. Tammy S. Fyke, petitioner. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 25, 1990.

EXHIBIT C

LOUIS E. COSTA
CLERK
(618)242-3120

STATE OF ILLINOIS
APPELLATE COURT
FIFTH DISTRICT
14TH & MAIN STREETS
MT. VERNON, IL 62864

10/31/90

Hon. Gary R. Boles
Clerk of the Circuit Court
Marion County Courthouse
Salem, IL 62881

Re: People v. Fyke, Tammy S.
Gen. No.: 5-87-0467
Marion Co. No. 86-CF-123

Dear Clerk:

Enclosed please find the Mandate of the Appellate Court in the above cause.

Under separate cover, the Record on Appeal is being returned to your office. Please sign the receipt which is being enclosed with the record and return the receipt to this office. The Record consists of: eight volumes.

Yours very truly,

Louis E. Costa, Clerk

LEC/nk
Enclo.

cc: Robert H. Rice
State's Attorneys Appellate Prosecutor - Mt. Vernon
Hon. Paul H. Hillis, State's Attorney of Marion County
Ronald A. Niemann

EXHIBIT D

AFFIDAVIT

NOW COMES Ronald A Niemann, Petitioner's counsel, under oath, and respectfully states the following:

1. Jurisdiction to consider this matter is provided by the provisions of 28 U.S.C. sec. 1257(a).

2. Petitioner was convicted of murder in Illinois and sentenced to sixty years. The Judgment was affirmed by the Appellate Court of Illinois (Fifth District). The Illinois Supreme Court refused leave to appeal (opinion of Appellate Court, attached) 133 Ill. 2d 564, 561 N.D.^{2d} 968, 149 Ill. Dec. 328.

3. Petitioner's counsel requests that the United States Supreme Court accept this Petition for a Writ of Certiorari and states the following reasons to show good cause why the late filing of the Petition is excusable.

a. On October 3, 1990 the Supreme Court denied Petitioner's request for leave to appeal (see letter from Illinois Supreme Court, attached).

b. Petitioner's counsel was, in October 1990, a sole practitioner whose office was located at 1404 West Main, Salem, Illinois.

c. Petitioner's parents consulted with the undersigned counsel sometime between October 15-19, to prepare a Petition for Writ of Certiorari to the United States Supreme Court.

d. The undersigned is a member of the bar of the United States Supreme Court, admitted 14 June 1982.

e. The undersigned has never before been engaged to represent a petitioner before This Honorable Court.

f. The undersigned has been a member of the bar of the State of Illinois since November, 1965.

g. The undersigned has generally limited his practice to the criminal proceedings in State Court.

h. Notwithstanding the above, the undersigned began investigation into the case to prepare a Petition for Writ for Certiorari to the United States Supreme Court on October 26, 1990.

i. The trial counsel in the lower court was Mr. Paul Hillis, 301 Melrose Ave., Centralia, Illinois 62801, (618)532-0175.

j. Counsel on appeal was Robert H. Rice, 110 E. Lincoln, Belleville, Illinois 62221, (618)277-6010.

k. The transcript of the trial proceedings is 3,329 pages.

l. Shortly after beginning work on this case, the undersigned counsel was unexpectedly required to move from his office on November 1, 1990. The building rented was purchased and was being razed.

Somer Realty, 907 West Main, Salem, Illinois 62881, (618)548-5123, handled the transaction and is aware of the short notice to counsel.

m. The undersigned had to join with an attorney in Centralia, Illinois, a town twenty (20) miles from 1404 West Main, Salem, Illinois, to have office space.

n. While re-establishing the practice of law, the new location has been in chaos since November 1, 1990.

o. From November 12 to November 30, 1990 the undersigned assimilated the files and information from attorneys Hillis and Rise to aid the preparation of Petition for Writ of Certiorari to the United States Supreme Court in this case.

p. On November 30, 1990 the undersigned developed an infection of the jaw which required medical consultation and treatment with Dr. Robert Gordon, 500 North Broadway, Salem, Illinois 62881, (618)548-

0774. THe condition had been present for some time and had been painful for days preventing counsel from sleeping and attending to regular duties and responsibilities such as petitioner's case.

q. On December 10, 1990 another infection developed this time in the left ear of the undersigned and was painful and interfered with counsel's attending to regular duties and responsibilities such as petitioner's case. Counsel required medical care and treatment from Dr. S.E. Rubio, Hawthorn Road, Salem, Illinois 62881, (618)548-4545.

r. Thereafter, sometime about December 20, 1990 while counsel's jaw infection and ear infection were stabilized with medical care, an eye infection developed, making it impossible for counsel to read.

s. The eye infection seemed to be unrelated to the previous infections.

Counsel was referred to an eye specialist on January 15, 1991. Counsel began treating with Dr. Walter Bogart of the Eye Clinic, 408 West Second, Centralia, Illinois 62801, (618)532-5531.

t. Counsel has been able to begin reading again January 22, 1991. Since January 22, 1991 counsel has finished the petitioner's Writ for Certiorari.

u. This Affidavit is dated January 29, 1991 and is attached to the Petition for Writ of Certiorari.

v. Under United States Supreme Court Rule 13, petitioner's request for Writ of Certiorari would be untimely ninety (90) days after the judgment of the Illinois Supreme Court (October 3, 1990).

w. To be timely, the Petition for Writ of Certiorari should be filed January 2, 1991 (January 1, 1991 being a holiday).

x. Counsel received a copy of a letter from the Appellate Court enclosing

the mandate of the Appellate Court. The letter is dated 10/31/90 (see copy of letter to Circuit Clerk Boles, Exhibit C).

y. Counsel did not receive a copy of the Illinois Supreme Court letter which was addressed to Mr. Robert H. Rice, counsel on appeal to that Court.

z. A misconstruction by counsel of United States Supreme Court Rule 13.1 resulted in a counting of the ninety (90) days, wherein a Petition for Writ of Certiorari to review a judgment in a criminal case shall be deemed in time when it is filed with the Clerk of this Court within ninety (90) days after "the entry of the Judgment." (emphasis added.), from 10/31/90, the date of the judgment of the Appellate Court, not the Illinois Supreme Court denial of appeal.

aa. It has only been since counsel resumed reading again (01/22/91) that it has been discovered that United States

Supreme Court Rule 13.4 explains and amplifies 13.1.

bb. Therefore, the ninety (90) day period would expire January 2, 1991, not January 29, 1991, the date of this Affidavit (January 1 being a holiday).

cc. This request is for the United States Supreme Court to docket the Petition for Writ of Certiorari instanter.

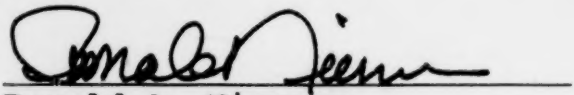
dd. The petitioner has raised serious Constitutional questions in the Petition for Writ of Certiorari to the United States Supreme Court and to deny petitioner an opportunity because of the occurrence of unusual circumstances would result in injustice.

ee. Notwithstanding counsel's misconstruction of United States Supreme Court Rule 13.1 with respect to timeliness, counsel would have prepared and filed the Petition for Writ of Certiorari in late November or no later than middle December,

1990, but for the unusual number of illnesses.

Further, your Affiant sayeth not.

WHEREFORE, counsel for the petitioner request that the United States Supreme Court docket the Petition for a Writ of Certiorari, instanter.



Ronald A. Niemann,
Attorney for Applicant-
Petitioner herein.
NIEMANN AND PARKER
830 East Noleman
P.O. Drawer G
Centralia, IL 62801
(618)533-0466

STATE OF ILLINOIS)
) SS:
COUNTY OF MARION)

I, Ronald A. Niemann, being first duly sworn on oath, hereby state that the matters and things contained in the foregoing Affidavit in support of a Petition for Writ of Certiorari are true and correct.

Ronald A. Niemann

Subscribed and sworn to before me this 29th day of January, 1991.

Notary Public

"OFFICIAL SEAL"
CATHERINE R. HARR
Notary Public, State of Illinois
My commission expires: 5/22/94

PROOF OF SERVICE

Ronald A. Niemann, attorney for applicant-petitioner herein, being duly sworn on his oath, certifies that on the ____ day of January, 1991, the foregoing Petition for Writ of Certiorari was served upon the following parties of record:

Hon. Stephen Norris
Deputy Director
States Attorney's Appellate Service
Route 15 East,
P.O. Box 2249
Mt. Vernon, IL 62864

Hon. Paul Hillis
Marion County States Attorney
Marion County Courthouse
Salem, IL 62881

Service was had be enclosing in an envelope addressed to the above parties at the addresses disclosed, postage fully

prepaid and by depositing said envelope in the United States Post Office mail box at Centralia, Illinois, on this 31st day of January, 1991.

Ronald A. Niemann
NIEMANN AND PARKER
830 East Noleman
P.O. Drawer G
Centralia, IL 62801
(618)533-0466

Subscribed and sworn to before me this 31st day of January, 1991.

Notary Public

"OFFICIAL SEAL"
CATHERINE R. HARR
Notary Public, State of Illinois
My commission expires: 5/22/94